

In re: RME FARMS, ROGELIO DOMINGO, AND PARADISE PRODUCERS.

00 AMA Docket No. F&V 928-1.

Decision and Order filed December 5, 2000.

Papayas – Papaya marketing order – Motion to dismiss – Handler – Standing – Grower – Failure to state a claim – Timely filing – Equal protection – Fourteenth amendment – Fifth amendment.

The Judicial Officer affirmed the decision by Judge Dorothea A. Baker (ALJ) dismissing the Amended Petition instituted under 7 U.S.C. § 608c(15)(A). The Judicial Officer struck one of the Petitioners, Johnson & Sons, from the Amended Petition based on the Petitioners' admission that Johnson & Sons was not a handler and did not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A). The Judicial Officer found the Amended Petition: (1) failed to address claims that can be raised in a proceeding under 7 U.S.C. § 608c(15)(A); (2) failed to request modification of or exemption from the Papaya Marketing Order; (3) failed to reference specific terms, provisions, interpretations, or applications of the Papaya Marketing Order that are not in accordance with law; (4) failed to allege facts sufficient to support the conclusion that the United States Department of Agriculture (USDA) violated 7 C.F.R. §§ 928.61 and 928.62; (5) failed to allege facts sufficient to support the conclusion that the Papaya Administrative Committee (PAC) violated 7 C.F.R. §§ 928.31(n), 928.61, and 928.62; and (6) failed to set forth the manner in which Petitioners, in their capacities as handlers, were, or could be, affected by any action alleged in the Amended Petition. Moreover, the Judicial Officer rejected Petitioners' contention that USDA and PAC violated the equal protection clause of the 14th Amendment to the United States Constitution. The Judicial Officer stated the 14th Amendment, by its terms, applies to the states and neither the USDA nor the PAC is a state or an instrumentality of a state. The Judicial Officer also rejected Petitioners' contention that the ALJ summarily dismissed many of Petitioners' claims without articulating the bases for the dismissal of the claims.

Gregory Cooper, for Respondent.

Steven D. Strauss, Hilo, Hawaii, for Petitioners.

Initial Decision issued by Dorothea A. Baker, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

Procedural History

RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Johnson & Sons, and Paradise Producers instituted this proceeding on February 2, 2000, by filing a Petition to Require Enforcement of Papaya Marketing Order Provisions/Regulations and/or Petition to Exempt Petitioner from the Papaya Marketing Order Provisions/Regulations Until the Papaya Administrative Committee and USDA Enforce the Provisions/Regulations of the Papaya Marketing Order [hereinafter Petition]. RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Johnson & Sons, and Paradise Producers instituted this proceeding under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter the AMAA]; the federal order regulating the handling of papayas grown in Hawaii (7 C.F.R. pt. 928) [hereinafter the Papaya Marketing Order]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Marketing Orders (7 C.F.R. §§ 900.50-.71) [hereinafter the Rules of Practice].

On February 28, 2000, Antonio Tagalicud requested permission to withdraw from the proceeding (Letter dated February 28, 2000, from Antonio Tagalicud to Joyce Dawson, Hearing Clerk).

On March 3, 2000, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Motion to Dismiss and Memorandum in Support of Respondent's Motion to Dismiss. Respondent contends the Petition should be dismissed because: (1) the Petition fails to address claims that can properly be raised in a proceeding instituted under section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)); (2) the Petition fails to identify any provision, interpretation, or application of the Papaya Marketing Order that is not in accordance with law; (3) the Petition fails to identify any obligation imposed under the Papaya Marketing Order that is not in accordance with law; (4) the Petition fails to demonstrate how any handler, in the capacity of a handler, was, or could be, affected by the actions alleged in the Petition; and (5) the Petition fails to seek modification of, or exemption from, the Papaya Marketing Order. Respondent also requests dismissal of Nestor Cacho, Johnson & Sons, and Virginia Aste because they are not handlers subject to the Papaya Marketing Order with standing to institute a proceeding under 7 U.S.C. § 608c(15)(A). Finally, Respondent requests dismissal of Antonio Tagalicud based on his February 28, 2000, request for permission to withdraw from the proceeding. (Respondent's Memorandum in Support of Respondent's Motion to Dismiss at 1-6.)

On March 31, 2000, RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Johnson & Sons, and Paradise Producers filed Petitioner's [sic] Memorandum in Opposition to Respondent's Motion to Dismiss [hereinafter Petitioners' Opposition]: (1) stating that RME Farms, Rogelio Domingo, Paradise Producers, and Johnson & Sons are grower-handlers with standing to institute a proceeding under 7 U.S.C. § 608c(15)(A); (2) conceding that Nestor Cacho, Virginia Aste, and Johnson & Sons are not handlers subject to the Papaya Marketing Order and do not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A);¹ (3) conceding that Antonio Tagalicud requested permission to withdraw from the proceeding; (4) contending that all the claims in the Petition are claims upon which relief can be granted under 7 U.S.C. § 608c(15)(A); and (5) requesting leave to amend the Petition (Petitioners' Opposition ¶¶ I-III).

On April 19, 2000, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] dismissed the Petition as to Antonio Tagalicud based on his request for permission to withdraw from the proceeding (Antonio Tagalicud Withdraws as Petitioner). The ALJ also found that Nestor Cacho, Virginia Aste, and Johnson &

¹RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Johnson & Sons, and Paradise Producers do not explain their inconsistent positions that Johnson & Sons is a grower-handler with standing to institute a proceeding under 7 U.S.C. § 608c(15)(A) and that Johnson & Sons is not a handler and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A).

Sons are not handlers with standing to institute a proceeding under 7 U.S.C. § 608c(15)(A) and dismissed the Petition as to Nestor Cacho, Virginia Aste, and Johnson & Sons. Based on her dismissal of Nester Cacho, Virginia Aste, Johnson & Sons, and Antonio Tagalicud, the ALJ amended the caption of the proceeding which had previously been “*In re RME Farms, Rogelio Domingo, Antonio Tagalicud, Nestor Cacho, Virginia Aste, Paradise Producers, and Johnson & Sons*” to read “*In re RME Farms, Rogelio Domingo, and Paradise Producers.*” (Dismissal of Petition as to Nestor Cacho, Virginia Aste, and Johnson & Sons.) Moreover, the ALJ concluded that RME Farms, Rogelio Domingo, and Paradise Producers [hereinafter Petitioners] are handlers with standing to maintain a petition under 7 U.S.C. § 608c(15)(A) and provided Petitioners with time within which to amend their Petition to better conform the Petition to the requirements of 7 C.F.R. § 900.52(b) (Status of Motion to Dismiss as to Three Remaining Petitioners).

On May 11, 2000, Petitioners and Johnson & Sons filed Amended Petition to Require Enforcement of Papaya Marketing Order Provisions/Regulations and/or Petition to Exempt Petitioner from the Papaya Marketing Order Provisions/Regulations Until the Papaya Administrative Committee and USDA Enforce the Provisions/Regulations of the Papaya Marketing Order [hereinafter Amended Petition]. Petitioners and Johnson & Sons allege: (1) in March 1998, transgenic papaya seeds were distributed to two growers, Delan Perry and William Julian, almost 2 months before transgenic papaya seeds were distributed to other “member groups” in violation of the Papaya Administrative Committee’s transgenic papaya seed distribution plan; (2) the United States Department of Agriculture failed to adequately and fully investigate a conspiracy among Delan Perry, William Julian, and Emerson Llantero, the manager of the Papaya Administrative Committee, to distribute transgenic papaya seeds to Delan Perry and William Julian in March 1998; (3) Petitioners and Johnson & Sons lost a significant amount of money because they were unable to obtain transgenic papaya seeds to produce papayas which they could process as handlers and they were unable to purchase papayas from their growers who were denied transgenic papaya seeds; (4) the preferential distribution of transgenic papaya seeds to Delan Perry and William Julian violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States and violates 7 C.F.R. §§ 928.61 and 928.62; (5) the Papaya Administrative Committee is required by 7 C.F.R. § 928.31(n) to adequately investigate compliance with the Papaya Marketing Order; (6) Emerson Llantero withheld transgenic “Sunup” seeds from Petitioners and Johnson & Sons during the period May 1, 1998, through July 1999, in violation of the Papaya Administrative Committee’s transgenic papaya seed distribution plan; (7) the United States Department of Agriculture’s failure to adequately investigate violations of, and enforce provisions of, the Papaya Administrative Committee’s seed distribution plan is arbitrary and capricious and violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States; (8)

some officers of the Papaya Administrative Committee, including Delan Perry, Loren Machida, Danny Molina, and Ken Kamiya, received state and federal papaya research grants and the receipt of state and federal papaya research grants conflicts with their duties as officers of the Papaya Administrative Committee; (9) Delan Perry and perhaps others violated a United States Department of Agriculture research protocol; (10) the United States Department of Agriculture inadequately investigated and responded to a written complaint by Paradise Producers; (11) Emerson Llantero and perhaps others submitted to the United States Department of Agriculture a fraudulent petition challenging the April 24, 1997, Papaya Administrative Committee nominating election; and (12) the Papaya Administrative Committee operates without proper oversight by the United States Department of Agriculture and the United States Department of Agriculture promotes fundamental inequities in violation of the Fourteenth Amendment to the Constitution of the United States and 7 C.F.R. §§ 928.61 and 928.62 (Amended Pet. ¶¶ 2-16).

Petitioners and Johnson & Sons seek: (1) an order requiring the United States Department of Agriculture to investigate the alleged violations of the Papaya Administrative Committee's transgenic papaya seed distribution plan, the Papaya Marketing Order, and state and federal papaya research grants; (2) an order requiring the United States Department of Agriculture to investigate fraud allegedly committed by Emerson Llantero and perhaps others in connection with the petition challenging the April 24, 1997, Papaya Administrative Committee nominating election; (3) an order requiring the United States Department of Agriculture to enforce the Papaya Administrative Committee's transgenic papaya seed distribution plan, the Papaya Marketing Order, and state and federal papaya research grants; (4) an order requiring the United States Department of Agriculture to redress the alleged fraud committed by Emerson Llantero and perhaps others in connection with the petition challenging the April 24, 1997, Papaya Administrative Committee nominating election; (5) declaratory relief; (6) damages; and (7) reasonable attorney's fees (Amended Pet. ¶ 18).

On June 12, 2000, Respondent filed Respondent's Motion to Dismiss Amended Petition and Memorandum in Support of Respondent's Motion to Dismiss Amended Petition. Respondent: (1) seeks dismissal of Johnson & Sons because it is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A); (2) contends the Amended Petition fails to address claims that can be raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A); (3) contends the Amended Petition fails to reference the specific provision, interpretation, or application of the Papaya Marketing Order that is not in accordance with law; and (4) contends the Amended Petition fails to demonstrate how any handler was, or ever could be, affected by actions alleged in the Amended Petition.

On July 10, 2000, the ALJ issued a Dismissal of Petition as to RME Farms,

Rogelio Domingo, and Paradise Producers² [hereinafter Initial Decision and Order]: (1) finding Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A); (2) striking Johnson & Sons from the Amended Petition; (3) finding the Amended Petition fails to address claims that can be raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A); (4) finding the Amended Petition fails to cite any specific term or provision of the Papaya Marketing Order that is improper, misinterpreted, or misapplied; (5) finding the Amended Petition fails to demonstrate how any handler, in its capacity as a handler, was, or could be, affected by any action alleged in the Amended Petition; and (6) dismissing the Amended Petition.

On July 14, 2000, Petitioners filed Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition. Petitioners: (1) concede Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A); (2) contend Petitioners are grower-handlers with standing under 7 U.S.C. § 608c(15)(A); and (3) contend the Amended Petition sufficiently identifies harm to Petitioners resulting from Respondent's failure to comply with the Papaya Marketing Order. On July 19, 2000, the ALJ rejected Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition as not having been timely filed (Untimely Response).

On August 16, 2000, Petitioners appealed to, and requested oral argument before, the Judicial Officer. On September 28, 2000, Respondent filed Respondent's Response to Petitioners' Appeal to the Judicial Officer. On October 12, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision and a ruling on Petitioners' motion for oral argument before the Judicial Officer.

Petitioners' request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit pursuant to section 900.65(b)(1) of the Rules of Practice (7 C.F.R. § 900.65(b)(1)), is refused because the issues have been fully briefed by Petitioners and Respondent. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record in this proceeding, I affirm the ALJ's Initial Decision and Order striking Johnson & Sons from the Amended Petition and dismissing the Amended Petition.

APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

²On July 11, 2000, the ALJ amended the title of the Dismissal of Petition as to RME Farms, Rogelio Domingo, and Paradise Producers to read "Dismissal of Amended Petition as to RME Farms, Rogelio Domingo, and Paradise Producers" (Addendum).

U.S. Const.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

. . . .

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article.

U.S. Const. amend. V, XIV.

5 U.S.C.:

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I—THE AGENCIES GENERALLY
CHAPTER 1—ORGANIZATION

§ 101. Executive departments

The Executive departments are:

The Department of State.
The Department of the Treasury.
The Department of Defense.
The Department of Justice.
The Department of the Interior.
The Department of Agriculture.
The Department of Commerce.
The Department of Labor.
The Department of Health and Human Services.
The Department of Housing and Urban Development.
The Department of Transportation.
The Department of Energy.
The Department of Education.
The Department of Veterans Affairs.

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CHAPTER 5—ADMINISTRATIVE PROCEDURE

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SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

§ 551. Definitions

For the purpose of this subchapter—

(1) “agency” means each authority of the Government of the

United States, whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix[.]

5 U.S.C. §§ 101, 551(1).

7 U.S.C.:

TITLE 7—AGRICULTURE

....

CHAPTER 26—AGRICULTURAL ADJUSTMENT

....

SUBCHAPTER III—COMMODITY BENEFITS

....

§ 608c. Orders regulating handling of commodity

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors,

associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as “handlers.” Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

. . . .

**(15) Petition by handler for modification of order or exemption;
court review of ruling of Secretary**

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

7 U.S.C. §§ 608c(1), 608c(15)(A).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

**SUBTITLE B—REGULATIONS OF THE DEPARTMENT
OF AGRICULTURE**

. . . .

**CHAPTER IX—AGRICULTURAL MARKETING SERVICE
(MARKETING AGREEMENTS AND ORDERS;
FRUITS, VEGETABLES, NUTS),
DEPARTMENT OF AGRICULTURE**

. . . .

PART 928—PAPAYAS GROWN IN HAWAII

Subpart—Order Regulating Handling

DEFINITIONS

. . . .

§ 928.7 Committee.

Committee means the Papaya Administrative Committee established pursuant to § 928.20.

§ 928.8 Grower.

Grower is synonymous with *producer* and means any person who produces papayas for market, and who has a proprietary interest therein.

§ 928.9 Handler.

Handler is synonymous with *shipper* and means any person (except a common or contract carrier transporting papayas owned by another person) who handles papayas in fresh form or causes papayas to be handled.

§ 928.10 Handle.

Handle or *ship* are synonymous and mean to sell, consign, deliver, or transport papayas or cause papayas to be sold, consigned, delivered, or transported within the production area or between the production area and any point outside thereof: *Provided*, That such term shall not include:

- (a) The sale of papayas on the tree;
- (b) The transportation of papayas from the location where grown to a packinghouse within the production area for the purpose or having such papayas prepared for market; or
- (c) The sale of papayas at retail by a person in his capacity as a retailer.

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ADMINISTRATIVE BODY

§ 928.20 Establishment and membership.

There is hereby established a Papaya Administrative Committee consisting of 13 members, each of whom shall have an alternate who shall have the same qualifications as the member. Ten of the members and their alternates shall be growers and are referred to as "grower" members of the committee. Seven of the grower members and their alternates shall be producers of papayas in District 1, two grower members and their alternates shall be producers of papayas in District 2, and one grower member and alternate shall be producers of papayas in District 3. No grower organization shall be permitted to have more than three members on the committee. Three of the members and their alternates shall be representatives of handlers and are referred to as "handler" members of the committee. The three handler members and their alternates shall be selected from the production area at large. No handler organization shall be

permitted to have more than one handler member on the committee. The number of grower and handler members and alternates on the committee, and the composition of the committee between growers and handlers may be changed as provided in § 928.31(o). The committee also may be increased by one public member and one alternate public member nominated by the committee and selected by the Secretary. The committee, with the approval of the Secretary, shall prescribe the qualifications of, and the nominating procedure for, the public member and alternate.

§ 928.21 Term of office.

The term of office of each member and alternate member of the committee shall be for two years beginning July 1 and ending on the second succeeding June 30, or such other dates recommended by the committee and established by the Secretary. The consecutive terms of office of a member shall be limited to three 2-year terms. Members and alternate members shall serve in such capacity for the portion of the term of office for which they are selected and have qualified and until their respective successors are selected and have qualified.

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§ 928.31 Duties.

The committee shall have, among others, the following duties:

....

(n) To investigate compliance with the provisions of this part[.]

....

MISCELLANEOUS PROVISIONS

§ 928.61 Compliance.

Except as provided in this part, no person shall handle papayas, the shipment of which has been prohibited by the Secretary in accordance with the provisions of this part; and no person shall handle papayas except in conformity with the provisions and the regulations issued under this part.

§ 928.62 Right of the Secretary.

The members of the committee (including successors and alternates), and

any agents, employees, or representatives thereof, shall be subject to removal or suspension by the Secretary at any time. Each and every regulation, decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disapproved action of the committee shall be deemed null and void, except as to acts done in reliance thereon or in accordance therewith prior to such disapproval by the Secretary.

7 C.F.R. §§ 928.7, .8, .9, .10, .20, .21, .31(n), .61, .62.

Johnson & Sons

A handler subject to the Papaya Marketing Order may file a written petition with the Secretary of Agriculture stating the Papaya Marketing Order or any provision of the Papaya Marketing Order or any obligation imposed in connection with the Papaya Marketing Order is not in accordance with law and requesting modification of the Papaya Marketing Order or exemption from the Papaya Marketing Order. (See 7 U.S.C. § 608c(15)(A).) It is well settled under the AMAA and the Rules of Practice that only a handler has standing to file a petition under 7 U.S.C. § 608c(15)(A).³

Petitioners concede that Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A) (Petitioners' Opposition ¶¶ II(A); Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition ¶¶ I(1), II(1)). Despite Petitioners' admission that Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A), Petitioners inexplicably identify Johnson & Sons as one of the Petitioners in the Amended Petition (Amended Pet. ¶ I(m)-(p)). Based on Petitioners' admission that Johnson & Sons is not a handler subject to the Papaya Marketing Order and does not have standing to institute a proceeding under 7 U.S.C. § 608c(15)(A), I strike Johnson & Sons from the Amended Petition.

Dismissal of Amended Petition

Section 8c(15)(A) of the AMAA (7 U.S.C. § 608c(15)(A)) provides that a handler subject to an order may file with the Secretary of Agriculture a written petition stating that the order or any provision of the order or any obligation imposed in connection with the order is not in accordance with law and requesting

³*In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1091 (1997); *In re Kent Cheese Co.*, 43 Agric. Dec. 34, 36 (1984); *In re M&R Tomato Distribs., Inc.*, 41 Agric. Dec. 33 (1982); *In re Sequoia Orange Co.*, 40 Agric. Dec. 1908 (1981).

modification of the order or exemption from the order. Section 900.52(b) of the Rules of Practice specifies the required contents of a petition filed under 7 U.S.C. § 608c(15)(A), as follows:

§ 900.52 Institution of proceeding.

....

(b) *Contents of petition.* A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation, such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant; [and]

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

7 C.F.R. § 900.52(b).

The Amended Petition: (1) fails to address claims that can be raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A); (2) fails to request modification of or exemption from the Papaya Marketing Order; (3) fails to reference specific terms, provisions, interpretations, or applications of the Papaya Marketing Order that are not in accordance with law; (4) fails to allege facts sufficient to support the conclusion that the United States Department of Agriculture violated 7 C.F.R. §§ 928.61 and 928.62; (5) fails to allege facts sufficient to support the conclusion that the Papaya Administrative Committee

violated 7 C.F.R. §§ 928.31(n), 928.61, and 928.62; and (6) fails to set forth the manner in which Petitioners, in their capacities as handlers, were, or could be, affected by any action alleged in the Amended Petition. Moreover, as a matter of law, neither the United States Department of Agriculture nor the Papaya Administrative Committee could have violated the Fourteenth Amendment to the Constitution of the United States, as alleged in the Amended Petition.

Petitioners make three claims in their Amended Petition. First, Petitioners allege that on or about September 1997, the Papaya Administrative Committee adopted a plan for the distribution of transgenic papaya seeds among growers registered with the Papaya Administrative Committee (Amended Pet. ¶ 3). Petitioners allege that, instead of complying with the Papaya Administrative Committee's transgenic papaya seed distribution plan, the University of Hawaii distributed transgenic papaya seeds to Delan Perry and William Julian in March 1998, almost 2 months before transgenic papaya seeds were made available to "other member groups" (Amended Pet. ¶ 4; Declaration of Michael Durkan ¶ 8 attached to Amended Pet.). Petitioners allege they were injured by the University of Hawaii's March 1998 distribution of transgenic papaya seeds to Delan Perry and William Julian because Petitioners were unable to obtain seeds to produce papayas and unable to purchase papayas from their growers, who were denied transgenic papaya seeds. Petitioners contend the March 1998 distribution of transgenic papaya seeds to Delan Perry and William Julian denied Petitioners their right to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States and violated sections 928.61 and 928.62 of the Papaya Marketing Order (7 C.F.R. §§ 928.61, .62). Petitioners also contend the Papaya Administrative Committee's failure to adequately investigate compliance with the Papaya Marketing Order violates section 928.31(n) of the Papaya Marketing Order (7 C.F.R. § 928.31(n)). (Amended Pet. ¶ 5.)

Actions instituted under 7 U.S.C. § 608c(15)(A) are handler actions designed to challenge provisions or obligations of an order that affect handlers. Petitioners are required by 7 C.F.R. § 900.52(b)(3) to set forth in the Amended Petition the manner in which they claim to be affected, as handlers, by the alleged unfair distribution of papaya seeds.

Growers are in a business distinct from that of handlers. Growers produce papayas, and generally, handlers sell, consign, deliver, or transport papayas from the packinghouse into commerce. (See 7 C.F.R. §§ 928.8, .9, .10.) From the handler's perspective, the identity of the grower supplying papayas to the handler is irrelevant. If one grower can obtain papaya seeds and can supply papayas, and another cannot, there is no effect on the handler.

Petitioners allege the unfair distribution of transgenic papaya seeds hurt them as handlers because the growers with whom they do business did not receive transgenic papaya seeds (Amended Pet. ¶ 5). However, the Papaya Marketing Order does not require handlers to purchase papayas from particular growers.

Handlers are free to purchase papayas from any grower. If growers from whom Petitioners buy papayas have no papayas for sale because these growers are unable to obtain papaya seeds, Petitioners are free under the Papaya Marketing Order to purchase papayas from other growers. Thus, the distribution of transgenic papaya seeds to growers had no effect on Petitioners in their capacities as handlers, and Petitioners' claims regarding the distribution of papaya seeds to growers are not claims that can be properly raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A).

Moreover, none of the provisions of the Papaya Marketing Order allegedly violated by the United States Department of Agriculture (7 C.F.R. §§ 928.61, .62) and the Papaya Administrative Committee (7 C.F.R. §§ 928.31(n), .61, .62) impose limitations on, or even relate to, the distribution of transgenic papaya seeds. Section 928.61 of the Papaya Marketing Order (7 C.F.R. § 928.61) prohibits persons from handling papayas, except as provided in 7 C.F.R. pt. 928. Section 928.62 of the Papaya Marketing Order (7 C.F.R. § 928.62) authorizes the Secretary of Agriculture to remove or suspend Papaya Administrative Committee members, agents, employees, and representatives and to disapprove Papaya Administrative Committee regulations, decisions, determinations, and acts. Section 928.31(n) of the Papaya Marketing Order (7 C.F.R. § 928.31(n)) states that the Papaya Administrative Committee has the duty to investigate compliance with the Papaya Marketing Order. Therefore, even if I found that the University of Hawaii distributed transgenic papaya seeds to Delan Perry and William Julian almost 2 months before transgenic papaya seeds were made available to "other member groups," I would not conclude the Papaya Administrative Committee violated 7 C.F.R. §§ 928.31(n), 928.61, and 928.62 and the United States Department of Agriculture violated 7 C.F.R. §§ 928.61 and 928.62, as alleged in the Amended Petition.

Further still, the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by its terms is applicable to the states, not to the federal government. Neither the Papaya Administrative Committee nor the United States Department of Agriculture is a state or an instrumentality of a state. (See 5 U.S.C. §§ 101, 551(1); 7 C.F.R. §§ 928.7, .20.) Therefore, as a matter of law, neither the Papaya Administrative Committee nor the United States Department of Agriculture could have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, as alleged in the Amended Petition.⁴

⁴While the equal protection clause of the Fourteenth Amendment is not applicable to the federal government, the Fifth Amendment, which is applicable to the federal government, contains an equal protection component. (*See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (holding the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542

Petitioners also allege Emerson Llantero withheld “Sunup” seeds from Petitioners during the period May 1, 1998, through July 1999 (Amended Pet. ¶ 9). However, Michael Durkan, owner of Paradise Producers, states he obtained and planted “Sunup” seeds prior to May 15, 1998 (Declaration of Michael Durkan ¶ 5 attached to Amended Pet.). Ernesto Tagalicud, d/b/a RME Farms, states he did not request “Sunup” seeds until July 15, 1999. Emerson Llantero offered Ernesto Tagalicud the requested “Sunup” seeds on July 29, 1999, and in August 1999, Ernesto Tagalicud received the quantity of “Sunup” seeds he requested. (Declaration of Ernesto Tagalicud ¶¶ 5-6 attached to Amended Pet.) The declarations attached to the Amended Petition indicate that Petitioners were not

n.21 (1987) (stating the Fourteenth Amendment applies to actions by a state; the Fifth Amendment, however, does apply to the federal government and contains an equal protection component); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (stating the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth Amendment); *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985) (stating although the Fifth Amendment, unlike the Fourteenth Amendment, does not contain an equal protection clause, it does contain an equal protection component, and the Court’s approach to Fifth Amendment equal protection claims has been precisely the same as the Court’s approach to equal protection claims under the Fourteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding the due process clause of the Fifth Amendment contains an equal protection component applicable to the federal government); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (holding equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (stating while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process; the Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as the Court’s approach to equal protection claims under the Fourteenth Amendment).)

Petitioners allege the University of Hawaii distributed transgenic papaya seeds to Delan Perry and William Julian in March 1998 (Declaration of Michael Durkan ¶ 8 attached to Amended Pet.). Petitioners do not allege that either the United States Department of Agriculture or the Papaya Administrative Committee distributed transgenic papaya seeds to Delan Perry and William Julian in March 1998. Instead, Petitioners allege the Papaya Administrative Committee was not issued the patent license necessary to distribute transgenic papaya seeds until April 1998 and transgenic papaya seeds were made available to all growers no later than May 1998 (Amended Pet. ¶ 4; Declaration of Michael Durkan ¶ 4 attached to Amended Pet.). Although Petitioners allege that the United States Department of Agriculture and the Papaya Administrative Committee violated Petitioners’ right to equal protection of the law, I find no nexus to any United States Department of Agriculture or the Papaya Administrative Committee conduct that could give rise to an equal protection inquiry. Therefore, even if Petitioners had alleged that the United States Department of Agriculture and the Papaya Administrative Committee violated the equal protection component of the Fifth Amendment to the Constitution of the United States, I would dismiss Petitioners’ claim that the United States Department of Agriculture and the Papaya Administrative Committee violated the equal protection component of the Fifth Amendment to the Constitution of the United States.

denied equal protection of the law or adversely affected by the timing of the Papaya Administrative Committee's distribution of "Sunup" seeds.

Second, Petitioners allege that, over the past 3 years, some officers of the Papaya Administrative Committee including, Delan Perry, Loren Machida, Danny Molina, and Ken Kamiya, received state and federal papaya research grants and the receipt of state and federal papaya research grants conflicts with their duties as officers of the Papaya Administrative Committee. Petitioners allege the Papaya Administrative Committee and the Agricultural Marketing Service, United States Department of Agriculture, "had input into and control over such research projects." Petitioners also allege Delan Perry sells papayas from a field covered by a papaya research grant in violation of the United States Department of Agriculture's "research protocol which requires a clear, noncommercial, funded proposal of extended duration." Petitioners further allege the United States Department of Agriculture inadequately investigated and responded to Paradise Producers' written complaint to a United States Department of Agriculture representative. (Amended Pet. ¶ 14.)

With respect to Petitioners' second claim, Petitioners fail to identify any provision of the Papaya Marketing Order or any obligation imposed in connection with the Papaya Marketing Order which is not in accordance with law and fail to request modification of or exemption from a provision of the Papaya Marketing Order, as required by 7 U.S.C. § 608c(15)(A). Further, Petitioners fail to specify the interpretation or application of the Papaya Marketing Order to which they object, as required by 7 C.F.R. § 900.52(b)(2).

Moreover, Petitioners declare that growers, not handlers, received the state and federal papaya research grants (Declaration of Ernesto Tagalicud ¶ 4, Ex. 1, and Ex. 2 attached to Amended Pet.). The Amended Petition fails to allege that Petitioners, in their capacities as handlers, were, or could be, affected by the state and federal papaya research grants made to growers. Therefore, Petitioners' claims regarding state and federal research grants to growers are not claims that can be properly raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A).

Third, Petitioners allege that Emerson Llantero and perhaps others submitted to the United States Department of Agriculture a fraudulent petition challenging the April 24, 1997, Papaya Administrative Committee nominating election. Specifically, Petitioners allege that Emerson Llantero and perhaps others reproduced Emeliana Delima's signature.⁵ (Amended Pet. ¶ 15.)

Petitioners' allegation that Emerson Llantero and perhaps others committed fraud in connection with a petition challenging the April 24, 1997, Papaya

⁵Petitioners state "[a]ccording to the accompanying Declaration of Emeliana Delima, she never signed [the] petition" challenging the April 24, 1997, Papaya Administrative Committee nominating election (Amended Pet. ¶ 15). The record does not contain a Declaration by Emeliana Delima attached to the Amended Petition.

Administrative Committee nominating election is not a claim that can be properly raised under 7 U.S.C. § 608c(15)(A). Petitioners fail to identify any provision of the Papaya Marketing Order or any obligation imposed in connection with the Papaya Marketing Order which is not in accordance with law and fail to request modification of or exemption from a provision of the Papaya Marketing Order, as required by 7 U.S.C. § 608c(15)(A). Further, Petitioners fail to specify the interpretation or application of the Papaya Marketing Order to which they object, as required by 7 C.F.R. § 900.52(b)(2).

Moreover, the term of office of those elected to the Papaya Administrative Committee in 1997 expired in 1999. (See 7 C.F.R. § 928.21.) Therefore, the issue of fraud by Emerson Llantero and perhaps others in connection with a petition challenging the April 24, 1997, Papaya Administrative Committee nominating election is moot.

Further still, Respondent attached a copy of the allegedly fraudulent petition to Respondent's Motion to Dismiss Amended Petition. The petition indicates that the April 24, 1997, nominating election was a grower election and the allegedly fraudulent petition is a grower petition, as follows:

May 6, 1997

Mr. Martin Engeler
USDA Ag. Marketing Service
Fruit and Vegetable Division
California Marketing Field Office
2202 Monterey Street, #102B
Fresno, CA 93721

Dear Mr. Engeler,

We, the undersigned papaya farmers, wish to express our concerns about the just-completed election of Big Island Growers Nomination. The election campaigns of some of the candidates were so rife with misinformation, innuendo and threats that the integrity of the entire PAC has been seriously compromised. Therefore, we ask that the just held elections be annulled and that new elections be scheduled as soon as possible. The new election should be carefully monitored to prevent the irregularities which plagued the just completed elections. To do otherwise may well lead to demise of the PAC.

Respondent's Motion to Dismiss Amended Petition, Attach. D.

None of the signatures on the allegedly fraudulent petition appear to be those of Petitioners. Moreover, Petitioners describe the petition as a "forged grower

[p]etition” in Petitioners’ Petition of Appeal of Decision and Order Granting Respondent’s Motion to Dismiss Amended Petition [hereinafter Appeal Petition] (Appeal Pet. at 3). Thus, I conclude the election was a grower election and the allegedly fraudulent petition challenging the grower election is a grower petition. Under these circumstances, the allegedly fraudulent petition could not be the basis for a handler petition under 7 U.S.C. § 608c(15)(A).

Petitioners further allege that on September 23, 1999, one of the Petitioners notified Terri Vawter, a United States Department of Agriculture representative, of Emerson Llantero’s fraud and the United States Department of Agriculture declined to fully and adequately investigate Emerson Llantero’s fraudulent act. Petitioners allege the United States Department of Agriculture’s failure to fully and adequately investigate Emerson Llantero’s fraudulent act violates the Fourteenth Amendment to the Constitution of the United States and sections 928.61 and 928.62 of the Papaya Marketing Order (7 C.F.R. §§ 928.61, .62). (Amended Pet. ¶¶ 15, 16.)

Even if I found that the United States Department of Agriculture failed to conduct a full and adequate investigation of the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima’s signature, that finding would not cause me to conclude that the United States Department of Agriculture violated the Fourteenth Amendment to the Constitution of the United States and sections 928.61 and 928.62 of the Papaya Marketing Order (7 C.F.R. §§ 928.61, .62), as alleged in the Amended Petition.

The United States Department of Agriculture is not a state or an instrumentality of a state. (See 5 U.S.C. §§ 101, 551(1).) Thus, the United States Department of Agriculture’s alleged failure to fully and adequately investigate the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima’s signature is not state action which deprives a person of life, liberty, or property without due process of law and is not state action which denies a person within the jurisdiction of the state equal protection of the laws. Further, the United States Department of Agriculture’s alleged failure to fully and adequately investigate the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima’s signature does not in any other way relate to the Fourteenth Amendment to the Constitution of the United States.

Moreover, the United States Department of Agriculture’s alleged failure to fully and adequately investigate the allegation that Emerson Llantero fraudulently reproduced Emeliana Delima’s signature does not violate, or relate in any way to, 7 C.F.R. § 928.61 or 7 C.F.R. § 928.62. Section 928.61 of the Papaya Marketing Order (7 C.F.R. § 928.61) prohibits persons from handling papayas, except as provided in 7 C.F.R. pt. 928. Section 928.62 of the Papaya Marketing Order (7 C.F.R. § 928.62) authorizes the Secretary of Agriculture to remove Papaya Administrative Committee members, agents, employees, and representatives and to disapprove Papaya Administrative Committee regulations, decisions, determinations, and acts. Thus, the United States Department of Agriculture’s alleged failure to fully and adequately investigate the allegation that Emerson

Llantero fraudulently reproduced Emeliana Delima's signature does not violate 7 C.F.R. § 928.61 and 7 C.F.R. § 928.62, as alleged in the Amended Petition.

Petitioners' Appeal Petition

Petitioners raise four issues in Petitioners' Appeal Petition. First, Petitioners contend the ALJ erroneously found that Petitioners did not timely file Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition (Appeal Pet. at 1).

Section 900.52(c)(1) of the Rules Practice (7 C.F.R. § 900.52(c)(1)) provides that the opposition to a motion to dismiss must be filed with the Hearing Clerk not later than 20 days after the service of the motion to dismiss upon the petitioner. On June 20, 2000, the Hearing Clerk served Petitioners with Respondent's Motion to Dismiss Amended Petition and Memorandum in Support of Respondent's Motion to Dismiss Amended Petition.⁶ Therefore, in accordance with 7 C.F.R. § 900.52(c)(1), Petitioners were required to file Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition with the Hearing Clerk no later than July 10, 2000.

Section 900.69(d) of the Rules of the Practice provides that the effective date of filing any document, other than a petition filed pursuant to 7 C.F.R. § 900.52, is the date the document is postmarked or the date the document is received by the Hearing Clerk, as follows:

§ 900.69 Filing; service; extensions of time; effective date of filing; and computation of time.

....

(d) *Effective date of filing.* Any document or paper, except a petition filed pursuant to § 900.52, required or authorized under these rules to be filed shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk. Any petition filed under § 900.52 shall be deemed to be filed when it is received by the hearing clerk.

7 C.F.R. § 900.69(d).

Therefore, Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition was required to be received by the Hearing Clerk or to be postmarked no later than July 10, 2000, in order to be timely filed.

The Hearing Clerk received Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition on July 14, 2000, 4 days after Petitioners were required to file Petitioners' Memorandum in Opposition to

⁶See Domestic Return Receipt for Article Number P368327729.

Respondent's Motion to Dismiss Amended Petition. The record does not include any postmarked envelope in which Petitioners mailed Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition. Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition is dated July 7, 2000; Petitioners' letter accompanying Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition is dated July 7, 2000; Petitioners state they mailed Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition "via first class United States mail July 7, 200[0]"; and the Hearing Clerk stated the envelope containing Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition was not retained (Appeal Pet. at 1; Respondent's Response to Petitioners' Appeal to the Judicial Officer at 1 n.1). Under these circumstances, I infer that Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition was postmarked July 7, 2000. Therefore, I find that Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition was timely filed.

However, I do not remand the proceeding to the ALJ for consideration of Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition. The ALJ considered Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition and concluded that, "even if it had been timely filed, the contents thereof would not have been sufficient to alter my Decision of July 10, 2000, that the Amended Petition should be dismissed." (Untimely Response.) Therefore, a remand of the proceeding to the ALJ for consideration of Petitioners' Memorandum in Opposition to Respondent's Motion to Dismiss Amended Petition would have no effect on the disposition of this proceeding.

Second, Petitioners contend the Amended Petition identified specific terms and provisions of the Papaya Marketing Order that were misapplied. Specifically, Petitioners state:

The Amended petition avers, in part, however, that certain preferential treatment was inadequately investigated and that such "preferential treatment violates the equal protection clause of the Fourteenth Amendment, U.S. Constitution, 7 C.F.R. § 928.61 and 7 C.F.R. § 928.62. Pursuant to § 928.31(n) of the Marketing Order, the committee is required to adequately investigate compliance with the provisions of the Marketing Order." Amended Petition ¶ 5. Accordingly, the Judge's Decision is in error.

Appeal Pet. at 1.

Petitioners did allege in the Amended Petition that the United States Department of Agriculture and the Papaya Administrative Committee violated the Fourteenth Amendment to the Constitution of the United States, 7 C.F.R. § 928.61, and

7 C.F.R. § 928.62, and the Papaya Administrative Committee violated 7 C.F.R. § 928.31(n). However, as discussed in this Decision and Order, *supra*, as a matter of law, neither the United States Department of Agriculture nor the Papaya Administrative Committee could have violated the Fourteenth Amendment to the Constitution of the United States. Further, the Amended Petition does not allege facts sufficient to conclude that the United States Department of Agriculture violated 7 C.F.R. §§ 928.61 or 928.62. Further still, the Amended Petition does not allege facts sufficient to conclude that the Papaya Administrative Committee violated 7 C.F.R. §§ 928.31(n), 928.61, or 928.62. Therefore, I agree with the ALJ's Initial Decision and Order in which she dismissed the Amended Petition.

Third, Petitioners contend they alleged an adequate basis for equal protection violations by the United States Department of Agriculture and the Papaya Administrative Committee. Petitioners contend the ALJ erroneously stated that the allegation of unequal seed distribution related solely to the State of Hawaii and cannot be raised in a proceeding under 7 U.S.C. § 608c(15)(A) and the ALJ erroneously ignored evidence that the seed distribution by the University of Hawaii violated the Papaya Administrative Committee's papaya seed distribution plan. Petitioners contend the Papaya Administrative Committee and the United States Department of Agriculture are obligated to ensure that the papaya seed distribution plan is fairly administered and the ALJ cannot properly countenance the Papaya Administrative Committee's and the United States Department of Agriculture's failure to correct constitutional violations simply because the State of Hawaii committed the violations. (Appeal Pet. at 2.)

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States by its terms is applicable to the states and is not applicable to the federal government. Neither the Papaya Administrative Committee nor the United States Department of Agriculture is a state or an instrumentality of a state. (See 5 U.S.C. §§ 101, 551(1); 7 C.F.R. §§ 928.7, .20.) Therefore, as a matter of law, neither the Papaya Administrative Committee nor the United States Department of Agriculture could have violated the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, as alleged in the Amended Petition.

Moreover, I agree with the ALJ that Petitioners allege that the University of Hawaii, a state agency,⁷ distributed transgenic papaya seeds to two growers, Delan Perry and William Julian, in March 1998. Therefore, Petitioners' claims regarding the distribution of transgenic papaya seeds in March 1998, relate solely to the State of Hawaii. Further still, as discussed in this Decision and Order, *supra*, the distribution of papaya seeds to growers affects growers, not handlers. Therefore,

⁷*Partington v. Gedan*, 961 F.2d 852, 865 (9th Cir.), *cert. denied*, 506 U.S. 999 (1992); *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986); *Anthony v. Cleveland*, 355 F. Supp. 789, 790 (D. Haw. 1973).

Petitioners' claims regarding the distribution of papaya seeds to growers are not claims that can be properly raised in a proceeding instituted under 7 U.S.C. § 608c(15)(A).

Fourth, Petitioners contend the ALJ's Initial Decision and Order summarily rejected Petitioners' "remaining claims." Petitioners assert that because of the ALJ's summary rejection of Petitioners' "remaining claims," Petitioners are at a loss to determine the basis for the ALJ's Initial Decision and Order with respect to these "remaining claims." (Appeal Pet. at 3.)

The ALJ is required to include in the Initial Decision and Order a statement of the basis for her rejection of Petitioners' claims. (See 5 U.S.C. § 557(c).) The ALJ states Respondent's Memorandum in Support of Respondent's Motion to Dismiss Amended Petition sets forth "good and sufficient reason why the Amended Petition should be dismissed. Said reasons are incorporated herein." (Initial Decision and Order at 2.) Thus, the ALJ identified the bases for her order dismissing the Amended Petition as being identical to the reasons for Respondent's contention that the Amended Petition should be dismissed. I agree with the ALJ that Respondent's Memorandum in Support of Respondent's Motion to Dismiss Amended Petition sets forth reasons for Respondent's contention that the Amended Petition should be dismissed. Therefore, based on the ALJ's incorporation into the Initial Decision and Order of Respondent's reasons for contending that the Amended Petition should be dismissed, I disagree with Petitioners' contentions that the ALJ failed to set forth the bases for her rejection of Petitioners' "remaining claims" and that the ALJ summarily rejected Petitioners' "remaining claims."

For the foregoing reasons, the following Order should be issued.

Order

Petitioners' Amended Petition filed May 11, 2000, is dismissed.
